

IP 05-0365-M 1 F USA v Tutrow
Magistrate Kennard P. Foster

Signed on 11/14/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Cause No. IP 05-0365M-01
)	
CHARLES R. TUTROW,)	
)	
Defendant.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant, Charles R. Tutrow, is charged in a complaint issued on September 13, 2005 with producing child pornography, a violation of Title 18 U.S.C. §2251(a); and possessing child pornography, in violation of Title 18 U.S.C. §2252(a)(4)(B). On November 1, 2005, at the initial appearance in the Southern District of Indiana, the government moved for detention pursuant to 18 U.S.C. §3142(f)(1)(A) and §3142(f)(2)(A) in that child exploitation crimes are crimes of violence per 18 U.S.C. §3156(a)(4)(C) and that the defendant presented a serious risk of flight if released. A preliminary examination and detention hearing were set for November 4, 2005. The United States appeared by Gayle L. Helart, Assistant United States Attorney. Charles R. Tutrow appeared in person and by his appointed counsel, Jim McKinley, Office of Indiana Federal Community Defender.

The Court found probable cause to believe that the defendant committed the offenses alleged in the complaint and attached affidavit. The probable cause finding gives rise to the presumptions that there is no condition or a combination of conditions which will reasonably

assure the appearance of the defendant or the safety of the community. The defendant submitted evidence by way of proffer and the Court found neither presumption rebutted. Alternatively, if the defendant had rebutted presumptions found in 18 U.S.C. §3142(e), it was established by clear and convincing evidence that the defendant is a danger to the community and other persons, a risk of flight, and a risk of obstructing justice. Consequently, he was ordered detained.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

1. The defendant, Charles R. Tutrow, is charged in this cause by way of a complaint and attached affidavit with producing and possessing child pornography, in violation of 18 U.S.C. §§2251(a) and 2252(a)(4)(B).

2. Pursuant to 18 U.S.C. §2251(2), the charge of producing child pornography has a penalty of between 15 years (minimum mandatory) and up to 30 years imprisonment. With one prior, Mr. Tutrow faces a minimum mandatory sentence of 25 years and up to 50 years imprisonment. With more than one qualifying prior conviction, Mr. Tutrow faces a minimum mandatory sentence of 35 years and up to life. Pursuant to 18 U.S.C. §2252(a)(4)(B), the charge of possessing child pornography has a penalty of up to 10 years imprisonment. With one or more prior qualifying conviction, the charge of possessing child pornography has a penalty of a minimum mandatory 10 years and up to 20 years imprisonment. Upon conviction for either charge he could be placed in supervised release for the rest of his life.

3. The Court takes judicial notice of the complaint and affidavit submitted in this cause. The Court further incorporates the evidence admitted during the probable cause and detention hearings as if set forth here.

4. The parties submitted the issue of probable cause to believe that the offense or offenses charged in the complaint and attached affidavit have been committed and that the defendant had committed those offenses at the preliminary hearing based upon the complaint and affidavit without further evidence or argument. The Court found probable cause that the offenses alleged in the complaint were committed and that the defendant committed same, and he was held to answer in the District Court.

5. The probable cause finding gives rise to the presumption that there is no condition or a combination of conditions which will reasonably assure the appearance of the defendant or the safety of the community. Title 18 U.S.C. §3142(e).

6. The Court considered a Pre-Trial Services Report (PS3) regarding Charles R. Tutrow on the issue of release or detention. The government had Special Agent Alex Rodriguez, ICE, available to testify. Agent Rodriguez was called to testify by the defendant on the issue of release or detention. The defendant called no other witnesses on the issue of detention, but did submit a proffer of testimony in support of an out-of-custody placement asserting that Mr. Tutrow was not a risk of flight and had never shown combative or physical aggression.

7. The following evidence demonstrated a compelling probability of Mr. Tutrow's conviction for the offenses charged in the complaint and attached affidavit:

(A) State and federal law enforcement officers executed a state issued search warrant at the residence of Charles R. Tutrow, Rushville, Indiana, on June 22, 2005. Mr. Tutrow's residence was a small studio-type apartment. Two computers, computer storage media, and a 35 mm. camera that takes still pictures were located and seized. One of the computers was turned on and operating. Law enforcement located several printed-out images of minor age males

engage in sexually explicit conduct, and drawings of minor age males, underneath the mattress within Mr. Tutrow's residence. Law enforcement also seized approximately 19 videotapes.

(B) One of the videotapes contained frame segments of visual depictions of two minors later identified and referred to in the affidavit and in this order as John Doe and Tom Doe. Both boys are approximately 9-10 years-old now and have been identified by their parents. In the videotape frame segments, John Doe and Tom Doe are depicted within the residence of Mr. Tutrow¹, and were engaging in sexually explicit conduct, including touching each other's penises and oral sex. At times, the boys looked at a direction in the room as if looking for guidance. Mr. Tutrow was a resident of the town in which the boys lived and befriended them because he fixed their bicycles and the bicycles of many other children. In Agent Rodriguez' opinion, the visual depictions of the minor in the videotape fit within the definition of illegal child pornography as it is defined by 18 U.S.C. §2256.

(C) During an interview of Mr. Tutrow away from his residence, but while it was being simultaneously searched, Mr. Tutrow admitted to possessing and receiving child pornography. Mr. Tutrow admitted searching for child pornography on the Internet and finding visual depictions of boys. Mr. Tutrow stated he was attracted to adult women, but stated he liked looking at pictures of nude boys. Mr. Tutrow directed the law enforcement officers to the location underneath his mattress of the printed visual depictions from the Internet and drawings of boys. Mr. Tutrow said he used the visual depictions of boys as a substitute instead of having contact with them.

¹ Law enforcement identified the inside of Mr. Tutrow's residence from their presence there during the execution of the search warrant on June 22, 2005.

(D) At his residence, Mr. Tutrow had a bottle of prescribed anti-depressant medicine in his name. After Mr. Tutrow was arrested by the Rushville law enforcement authorities in July, 2005, the jailors in Rush County noted that Mr. Tutrow banged his head against the wall of his jail cell following a visit with his defense lawyer. A video camera was then stationed outside his jail cell and he was observed more closely so that he did not harm himself.

(E) Mr. Tutrow suffered a felony conviction in Hancock County, Indiana in 1992, for Child Exploitation, the state version of photographing a minor in actual or simulated sadistic or masochistic conduct. The charging document alleges that the child involved in that incident was 8 years-old and male. Mr. Tutrow received a 3-year sentence of imprisonment.

(F) Mr. Tutrow told Tom Doe's mother that he had lived in Indianapolis, Greenfield, Arlington, and Rushville, Indiana. Even though he is of limited financial means (*i.e.*, there was evidence presented that his mother helps pay his rent and Internet bill), he has been able to move from one locale to another and freely travel within each locale.

6. Mr. Tutrow has demonstrated a persistent pattern of engaging in sexual exploitation of children. His receipt and possession of additional child pornography demonstrates a persistent pattern in that regard and a strong tendency that he is likely to commit similar offenses if released pending trial.

7. Because there is probable cause that Mr. Tutrow committed a violation of §2251(a), the rebuttable presumptions described in 18 U.S.C. §3142(e) apply. This creates a burden of production upon the defendant, not a burden of persuasion. The purpose of the rebuttable presumption is to shift the burden to the defendant to produce a basis for concluding that there are conditions of release sufficient to reasonably assure that the defendant will not engage in

dangerous criminal activity pending trial and/or appear as required for further proceedings before the Court and/or be a serious risk to obstruct justice, or threaten, injure, or intimidate a prospective witness. The Seventh Circuit has adopted the thorough reasoning of the Court in *United States v. Jessup*, 757 F.2d 378, 381 (1st Cir. 1985). See, *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) and *United States v. Diaz*, 777 F.2d 1236 (7th Cir. 1985). Although most rebuttable presumptions found in the law disappear when any evidence is presented by the opponent of the presumption, the rebuttable presumption of Section 3142(e) is not such a “bursting bubble.” *Jessup*, 757 F.2d at 383. Thus, in order to rebut the presumption, the defendant must produce some evidence; and the Magistrate Judge should still keep in mind the fact that Congress has found that certain drug offenders and individuals involved in crimes of violence, as a general rule, pose special risks of flight and dangers to the community. *Dominguez*, 783 F.2d at 707; *Diaz*, 777 F.2d at 1238; *Jessup*, 757 F.2d at 383. The Court concludes that the defendant has not rebutted the presumptions. He is therefore ordered detained.

8. Assuming for the purposes of argument that the defendant has rebutted the presumptions, then the Court must, pursuant to 18 U.S.C. §3142(e), (f) and (g), determine whether any condition or combination of conditions of release will reasonably assure the appearance of the person as required and the safety of any other person and the community in deciding whether to grant the government Motion for Detention. The United States, with respect to the risk of flight issue or whether defendant is a risk to obstruct justice or to threaten, injure, or intimidate a prospective witness bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Vortis*,

785 F.2d 327, 328-29 (D.C. Cir. 1986); *United States v. Fortna*, 769 F.2d 243, 250 (5th Cir. 1985); *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 (8th Cir. 1985); *United States v. Himler*, 797 F.2d 156 (3rd Cir. 1986); *United States v. Leibowitz*, 652 F. Supp. 591 (N.D. Ind. 1987). With respect to risk to the community's safety, however, the United States must prove its allegations by clear and convincing evidence. 18 U.S.C. §3142(f); *United States v. Salerno*, 481 U.S. 739 (1987); *United States v. Knight*, 636 F. Supp. 1462 (S.D. Fla. 1986); *Orta, supra*; and *Leibowitz, supra*. Detention can be based on a showing either of (1) dangerousness, or (2) risk of flight, risk of obstruction of justice, risk to threaten, injure, or intimidate a prospective witness. Proof of more than one is not required. *Fortna*, 769 F.2d at 249. Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418 (1979). The standard is "reasonable assurance"; the Court cannot order detention because there are no conditions which would guarantee appearance and the community's safety. *Orta, supra*; *Portes, supra*; *Fortna, supra*.

Among the factors at issue regarding Mr. Tutrow's release or detention are his family ties, length of residence in the community and community ties. Mr. Tutrow strongly argued that he was not a flight risk as these factors should be weighed in favor of his release. This Magistrate Judge disagrees and finds, as Congress did, that evidence of the presence of community ties and related ties have no correlation with the question of safety of the community in general and specifically regarding the risk a defendant may pose to obstruct justice or to threaten, injure, or intimidate a prospective witness. Therefore, they are of limited weight even if the defendant presents favorable evidence regarding those ties when weighed against all

factors and the totality of the evidence that demonstrate a continuous pattern of illegal conduct. *See, United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); *S.Rep. No. 225, 98th Cong., 1st Sess. at 24, reprinted in 1984 U.S. Code & Ad.News at 27 (Supp. 9A).*

The Court having weighed the evidence regarding the factors found in 18 U.S.C. §3132(g) and, based upon the totality of the evidence set forth above, concludes that if the defendant had rebutted the presumptions in favor of detention, he, nevertheless, would be detained, because he is, by clear and convincing evidence, a serious risk of flight, a danger to the community and other persons, and a risk of obstructing justice.

WHEREFORE, Charles R. Tutrow is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this 14th day of November, 2005.

Kennard P. Foster, United States Magistrate Judge
United States District Court

Distribution:

Gayle Helart,
Assistant U. S. Attorney
10 West Market Street, Suite 2100
Indianapolis, Indiana 46204

Jim McKinley,
Office of Indiana Federal Community Defender
111 Monument Circle, Suite 752
Indianapolis, Indiana 46204

United States Marshal

United States Probation, Pre-Trial Services